Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS

No. 82-708

In the Supreme Court of the United States

OCTOBER TERM, 1982

SUMMA CORPORATION, PETITIONER

v.

STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DIRK D. SNEL
RICHARD J. LAZARUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF CONTENTS

	Page
Statement	1
Discussion	3
A. Federal law questions are properly presented	3
B. The decision below, so far as it rests on resolution of federal law questions, is erroneous	6
C. The federal questions decided are of substantial importance	11
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Agins v. *City of Tiburon*, 447 U.S. 255	11
Barker v. *Harvey*, 181 U.S. 481	9
Borax, Ltd. v. *Los Angeles*, 296 U.S. 10	5, 8
California ex rel. State Lands Commission v. *United States*, No. 89, Original (June 18, 1982)	3, 12
Devine v. *Los Angeles*, 202 U.S. 313	5
Eldridge v. *Trezevant*, 160 U.S. 452	10
Hooker v. *Los Angeles*, 188 U.S. 314	5
Hughes v. *Washington*, 389 U.S. 290	3, 12
Illinois Central R.R. v. *Illinois*, 146 U.S. 387	6
Kaiser Aetna v. *United States*, 444 U.S. 164	10
Knight v. *United States Land Association*, 142 U.S. 161	8
Los Angeles Milling Co. v. *Los Angeles*, 217 U.S. 217	5
Marks v. *Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790	6, 7, 12
Montana v. *United States*, 450 U.S. 544	8, 11
New Orleans v. *United States*, 35 U.S. (10 Pet.) 662	9, 10
Orr v. *Orr*, 440 U.S. 268	6
People v. *California Fish Co.*, 166 Cal. 576, 138 P. 79	6
PruneYard Shopping Center v. *Robins*, 447 U.S. 74	11

Cases—Continued: Page

San Diego Gas & Electric Co. v. *San Diego*, 450 U.S. 621 11
San Francisco v. *Le Roy*, 138 U.S. 656 8
Shively v. *Bowlby*, 152 U.S. 1 8
State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 ..... 11, 12
State of California v. *Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied *sub nom. Lyon* v. *California*, 454 U.S. 865 6
Stewart v. *United States*, 316 U.S. 354 8
Thompson v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72 9
United States v. *Coronado Beach Co.*, 255 U.S. 472 ..... 8, 9
United States v. *Title Insurance Co.*, 265 U.S. 472 9
Whitney v. *California*, 274 U.S. 357 5

Constitution, treaty and statutes:

United States Constitution:
Article I, Section 8, Clause 3 (Commerce Clause) 10
Fifth Amendment 3, 11
Fourteenth Amendment 3
Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922 4
Art. VIII, 9 Stat. 929 9
Act of Mar. 31, 1808, Acts of the Terr. of Orleans, 2d Leg., 1st Sess., ch. 29, 120-128 10
Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, as supplemented by the Act of July 1, 1864, ch. 194, 13 Stat. 332 ..... 4, 9, 10
28 U.S.C. 1257(3) 6
Louisiana Civil Code of 1825, Art. 661 10
Louisiana Revised Civil Code of 1870, Art. 665 10

Miscellaneous:

16 West's LSA-C.C. 407 (1972) 10

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-708

SUMMA CORPORATION, PETITIONER

v.

STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This Memorandum is submitted in response to the Court's invitation of January 17, 1983. We conclude that the petition properly presents several questions of federal law, that these were wrongly decided by the California Supreme Court, that the issues are of substantial importance both to private landowners and to the United States, and, accordingly, that certiorari should be granted.

STATEMENT

The present controversy concerns a small and very shallow tidal body of water south of Venice, California, the remnant of a substantially larger "inner

bay" connected to the Pacific Ocean. See Pet. 3-5; Pet. App. A-2, A-36, A-52 to A-53. It is common ground that the lands underlying the "lagoon" are privately owned and have been since they were included in a Mexican grant in 1839, a grant confirmed by the United States, after elaborate proceedings, by issuance of a patent encompassing the lagoon in 1873. See Pet. App. A-2, A-4 to A-5, A-8. The City of Los Angeles and the State of California nevertheless assert the right to dredge the lagoon, construct sea walls, make other improvements therein, and to open it to public navigation, fishing and recreation, all without exercising the power of eminent domain, and instituted judicial proceedings to vindicate these claims. Pet. App. A-2 to A-3, A-36 to A-37.

The Superior Court sustained the plaintiffs' position, primarily on the ground that the State enjoyed a "public trust easement" over the lands which included the rights asserted. Pet. App. A-59. Additionally, the court concluded that the previous owners had "dedicated" the lands in question to public use. Pet. App. A-60. Both holdings were reversed by the intermediate appellate court. Pet. App. A-35 to A-45. But a divided California Supreme Court in turn set aside the intervening ruling and affirmed the trial court. Pet. App. A-16, A-34. The Supreme Court did not reach the "dedication" claim, resting its judgment solely on the "public trust" doctrine. Pet. App. A-16. We discuss in a moment the path to decision followed by that court.

Respondents now assert that no federal question is presented and that this Court lacks jurisdiction to review the judgment below. Cal. Br. in Opp. 2, 11-12; L.A. Br. in Opp. 4, 25-29. Petitioner disagrees, correctly in our view. Reply Br. 2-3.

DISCUSSION

A. Federal Law Questions Are Properly Presented

It may be that the California Supreme Court could have reached much the same result without deciding any of the questions of federal law now presented. Thus, it might have held that, as a matter of current State law, all water bodies of a certain size—regardless whether defined by federal law as "arms of the sea" or "tidal" or "navigable waters"—are preserved for public use and cannot be filled, drained, or enclosed, or, at least, that the State may exercise its police power to protect such water bodies, to improve them and to regulate public access there; and that these sovereign prerogatives attach whether or not the underlying lands, submerged or tidelands, are in private ownership, and without regard to the source of the private title.

Of course, such a holding could have been challenged on the ground that the California rule, when first announced or applied, amounted to a "taking" of private property without compensation, in violation of the Fifth and Fourteenth Amendments. See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring). So, also, a substantial federal question would be presented if that rule were sought to be applied where the United States remains the owner of the littoral lands. See *California ex rel. State Lands Commission* v. *United States*, No. 89, Original (June 18, 1982), slip op. 8-11, 13-14. But there would then be no issue under the federal patents or the legislation providing for confirmation of Mexican grants, nor any question implicating the Treaty with Mexico or the Equal Footing Doctrine.

As it happens, however, the California Supreme Court rested its decision on a very different basis—

perhaps to avoid the "taking" problem. There is not the slightest ambiguity about the course of reasoning followed by the California Court. It consists of four principal steps, each treated as essential to the result. In the court's own words, the four dispositive questions, all except the third answered in the affirmative, were:

1. "[W]hether the title [petitioner's] predecessors received from Mexico [in 1839] was subject to the rights of the public [now claimed by the State and City]" (Pet. App. A-8); and, if so—
2. "[W]hether the United States acquired these rights upon annexation of California [in 1848]" (*ibid.*; see also *id.* at A-9); and if so—
3. "[W]hether those rights [—having been held in suspense pending the confirmation proceedings—] were relinquished [by the United States to the Mexican grantees] by issuance of the patents [to them in 1873]" (*id.* at A-11); and, if not—
4. Whether, "when California was admitted to the Union, it succeeded to [these] rights of the United States" (*id.* at A-8; see also *id.* at A-15).

Quite obviously, none of these is an issue of California law. The first question involves the law of Mexico; the second depends on the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922; the third is governed by the congressional Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, as supplemented by the Act of July 1, 1864, ch. 194, 13 Stat. 332, and by federal administrative and judicial determinations made, and patents issued, pursuant to those statutes; and the fourth requires application of the Equal Footing Doctrine, a rule of federal constitutional law. Indeed,

under the approach followed by the California Supreme Court, State law plays no role until it is determined that the property rights in issue inured to California, and then the only question is whether the State has chosen to retain those rights for the benefit of the public, or has relinquished them to the owner of the water bottoms. As to that matter—never seriously at issue—this Court must of course accept as final the answer given by the highest California tribunal. But it seems to us plain that this determination directly rests on decision of several federal law questions which are open to re-examination here.[1]

In light of the explicit rulings of the California Supreme Court, it is unnecessary to parse the pleadings and the arguments raised by the parties at every stage of the proceedings. *E.g.*, *Whitney* v. *California*, 274 U.S. 357, 360-361 (1927). If there are independent State grounds available to support the judgment below, they are no part of the case in this Court, since they were not invoked by the California Supreme Court, which chose to rest its decision on a

---

[1] The three decisions of this Court relied on by Respondent California (Br. in Opp. 13-15), *Los Angeles Milling Co.* v. *Los Angeles*, 217 U.S. 217 (1910); *Devine* v. *Los Angeles*, 202 U.S. 313 (1906); and *Hooker* v. *Los Angeles*, 188 U.S. 314 (1903), do not dictate a different conclusion. Each of those cases, dismissed by the Court for want of jurisdiction, raised the distinct issue whether, by confirming a Mexican grantee's title to land, the federal patent process also resolved questions as to the grantee's entitlement to associated water rights. It was held that the federal patent process left those water rights issues to applicable local law, including state court construction of relevant foreign law. In this action, however, the question presented concerns the fullness of the title to land confirmed by the federal patent, an issue of federal law. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935).

different basis. See *Orr* v. *Orr*, 440 U.S. 268, 274-277 (1979). Indeed, it is fair to read its opinion as announcing the court's view that the State could *not* now enjoy the "public trust" rights claimed *unless* those rights were reserved by Mexico, were ceded to the United States, were withheld from the patent, and were passed on to California by the United States. Accordingly, we believe the petition for certiorari, challenging these holdings, properly invokes this Court's jurisdiction under 28 U.S.C. 1257(3).

B. The Decision Below, So Far As It Rests On Resolution Of Federal Law Questions, Is Erroneous

We hesitate to attempt any all embracing definition of the California "public trust doctrine." It appears to be a very vigorous (not to say voracious) creature, still growing, both in size and strength.[2] Suffice it to say that, as applied in this case, the public trust rights recognized by the California Supreme Court amount to an estate in land of very pervasive character. Moreover, since the interest is held for the benefit of the public, the State's power of alienation is restricted. See *People* v. *California Fish Co.*, 166 Cal. 576, 597, 138 P. 79, 88 (1913). Cf. *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452-453 (1892). But, most importantly for this case, vis-a-vis the title owner of the property, the public trust apparently constitutes a perpetual and comprehensive easement

---

[2] See, *e.g.*, *State of California* v. *Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied *sub nom. Lyon* v. *California*, 454 U.S. 865 (1981) (extending geographic scope of public trust doctrine beyond beds of tidal navigable waters to beds of nontidal, navigable waters); *Marks* v. *Whitney*, 6 Cal. 3d 251, 259-260, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (trust purposes broadened to include preservation of property in natural state).

or servitude that may wholly dispossess him of all the benefits of his land, save only the right to transfer the bare title (assuming an interested buyer).[8] Indeed, in the present decision, the California Supreme Court has expressly described the public rights held by the State within privately owned tidelands as creating at least approximately the same regime that obtains outside the area of the Mexican cession (north of Sonoma) where the State itself owns navigable water bottoms and tidelands. See Pet. App. A-15 to A-16.

There is the rub. Subject only to the paramount federal navigation servitude, it is of course entirely a matter for the State to regulate in the public interest lands permanently or periodically covered by navigable waters which inured to California under the Equal Footing Doctrine and remain in State ownership. And, provided it gave fair notice, the State is free to retain whatever easement it deems appropriate when it relinquishes to the riparian or littoral owner its title to tidelands or banks below high water mark. But when such lands were never in State ownership—because alienated before statehood—it is difficult to appreciate how California can claim the same interest in them or treat them as equally subject to the public trust doctrine.

Although lands underlying navigable waters normally inure to the State upon its admission to the Union, it is firmly settled that this constitutional principle—an aspect of the Equal Footing Doctrine—is inapplicable when the lands were previously alien-

---

[8] Under California precedent, moreover, restrictions imposed by the trust can be invoked not only by the government, but also by a private citizen in a lawsuit. *Marks* v. *Whitney*, *supra*, 6 Cal. 3d at 261-262, 491 P.2d at 381-382, 98 Cal. Rptr. at 797-798.

ated by the United States, or by a prior sovereign in a conveyance confirmed by the United States pursuant to a treaty undertaking. See *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894); *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981). Perhaps the most notorious exception relates to Mexican grants, which not infrequently included water bottoms otherwise within the reach of the Equal Footing Doctrine. *E.g.*, *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-671 (1891); *Knight* v. *United States Land Association*, 142 U.S. 161, 183-184 (1891); *United States* v. *Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921). See also *Borax, Ltd.* v. *Los Angeles*, *supra*, 296 U.S. at 15, 19-21. According to the California Supreme Court, this is such a case. See Pet. App. A-8 & n.7. Yet, that court attempts to avoid the natural consequence by supposing that the title to the "lagoon" conveyed to the Mexican grantees, and later confirmed by the United States, was burdened with a pervasive public easement that effectively recaptures for the State the estate it would have enjoyed if no prior grant had been made. We cannot acquiesce in that result.[4]

---

[4] We deem it unnecessary to determine whether the California Supreme Court was right in concluding (Pet. App. A-4 to A-7) that an ambiguity existed in the patent documentation, rendering permissible later judicial consideration of the actual tideland character of the "inner bay." Although the patent conclusively determines the physical, and thus the legal, boundaries of a claim, it does not necessarily follow that the patent provides the final word on the actual ecological characteristics of the subject property. Compare *Stewart* v. *United States*, 316 U.S. 354 (1942). Where we disagree with the court below, however, is in its assumption that the "tide lands" character of the land included in the patent could create a public trust property interest capable of slipping through the federal patent process and inuring to the State.

As we view it, the holding of the California Supreme Court violates the promise given in the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, Art. VIII, 9 Stat. 929 (Pet. App. A-96) that vested property rights would be "inviolably respected," and impermissibly impugns the final determination made (Pet. App. A-128) and the patent issued (*id.* at A-115) under the Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 (Pet. App. A-108), which unreservedly confirm that the prior grant included the tidelands in suit. We doubt that Mexican law recognized the comprehensive public servitude now asserted by the State in respect of this very shallow water body. See *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 485-486. But that is not dispositive. What is perfectly clear is that during the protracted confirmation proceedings, California claimed no interest in the tidelands and the patent ultimately issued withheld no pervasive easement. That is the end of the matter. See *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72, 77 (1901); *Barker* v. *Harvey*, 181 U.S. 481, 491-492 (1901); *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *United States* v. *Title Insurance Co.*, 265 U.S. 472, 483-486 (1924).[5]

---

[5] Neither of the two cases cited by respondent California (Br. in Opp. 20-23) for the proposition that the State's public trust property interest survived the federal patent process supports that claim.

In *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836), this Court did *not* hold that property owned by the United States was subject to a public trust restraint on alienation, notwithstanding a federal patent. The basis of the Court's ruling that the United States could not enjoin the City of New Orleans from advertising certain lots for sale was

To be sure, neither the law of Mexico nor the patent issued under the Act of 1851 can defeat the federal servitude attaching to all navigable waters of the United States by virtue of the Commerce Clause of the Constitution. Whether that servitude today applies to Ballona Lagoon in its present condition is not clear. See *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). But this principle can in no event support California's claim. It is fundamental that the federal navigational servitude, where applicable, remains with the United States and is no part of the grant to newly admitted States under the Equal Foot-

---

that the United States did not own or even have regulatory jurisdiction over the property in question. *Id.* at 736.

Nor can respondents derive much comfort from *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896). At the end of the day, that decision holds no more than that a federal patent granting land apparently then owned by the United States did not nullify a limited servitude for the construction of levees for the public safety which had long before been announced in the local laws as applicable to lands bordering the Mississippi River and other rivers subject to overflow. As this Court noted, the rule was founded on a "doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time" and, in any event, was "explicitly asserted in the Civil Code of Louisiana." *Id.* at 463. Indeed, the same provision was included in the *Digest of the Civil Laws Now in Force in the Territory of Orleans*, approved by the Territorial Legislature and Governor Claiborne in 1808 (see Act of Mar. 31, 1808, Acts of the Terr. of Orleans, 2d Leg., 1st Sess., ch. 29, 120-128), and commonly known as the "Civil Code of 1808." See 16 West's LSA-C.C. 407 (1972). It was carried forward in the Civil Code of 1825 (Art. 661) and the Revised Civil Code of 1870 (Art. 665). *Ibid.* Thus, in the absence of anything to the contrary in the document, it was appropriate to construe a patent issued after the Louisiana Purchase (and presumably after 1808) as subordinating the estate granted to the then established levee servitude.

ing Doctrine. See *Montana* v. *United States*, *supra*, 450 U.S. at 551; *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375-376 (1977). The United States reserved no other interest affecting these tidelands and passed none on to California.

Needless to say, we are not remotely suggesting that Mexican grant lands are uniquely immune from legitimate regulation by the State in the exercise of its police power. Indeed, California and its municipalities have not been shy on this score and we have had occasion to lend our support in defending such laws against a Fifth Amendment "taking" challenge. *E.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). But, here, California asserts something more, a property interest in the land, said to have been reserved by the United States and transferred to the State in 1850. This is a claim we cannot endorse.

C. The Federal Questions Decided Are Of Substantial Importance

Assuming the decision below is erroneous, the scope of the resulting mischief cannot be assessed with certainty. At least three questions arise: How many factually similar situations will be governed by the ruling? What are the predictable extensions of the doctrine espoused by the California Supreme Court if left uncorrected? And, to what extent would a like result be achievable through a legitimate exercise of the State's police power?

We can give no definitive answer. However, our own limited investigation tends to confirm the representations made on these points in the Amicus Curiae Brief for the California Land Title Association.

The State apparently does not challenge the significant scope of the decision. And the California Supreme Court itself recognized that it was breaking important new ground, applying the public trust doctrine for the first time to land never owned by the State (Pet. App. A-1 to A-2). See also the dissenting opinions of Justice Richardson (*id.* at A-20 to A-21, A-30) and Justice Kaus (*id.* at A-31 to A-32).[6]

We add two further considerations. The first is that, if left unreviewed, the decision of the California Supreme Court may well be emulated elsewhere. Indeed, since that holding depends on very broad propositions in no way confined to California, other States may be tempted to assert a like interest in submerged lands alienated by prior sovereigns—whether Mexico or Spain or France, or even Great Britain. Although one hopes other courts would decline the invitation to follow the lead of the California Court, it is not safe to assume that none would read the

---

[6] While the court eschewed deciding whether the rule announced reaches former tidelands, now filled or reclaimed, that door was left invitingly open and there is every reason to suppose California will renew its claim in respect of such areas. See Pet. App. A-16 n.15. Indeed, if the State's interest in the tidelands vested upon its admission to the Union under the Equal Footing principle and the "open coast" rule of *Hughes* v. *Washington*, *supra*, re-affirmed in *California ex rel. State Lands Commission* v. *United States*, *supra*, is inapplicable, there would appear to be no federal law obstacle to California's continuing to assert that interest after natural or artificial causes had changed the physical character of the former tidelands. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 376-378. And, as a matter of State law, it seems settled that "[r]eclamation [of tidelands] * * * does not ipso facto terminate the public trust." *Marks* v. *Whitney*, *supra*, 6 Cal. 3d at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797.

silence of this Court as a signal that no principle of federal law stands in the way.

Finally, we must voice a concern on behalf of the custodians of federal lands acquired from the holders of Mexican (or other foreign) grants and now reserved to special uses. See Brief of Amicus Curiae California Land Title Association at 5. We are far from conceding that the United States would be subject to the same restrictions as private landowners. Yet, if California (and other States) are recognized to hold a property interest in such acquired lands, existing independently of any exercise of the police power, the special prerogatives and immunities enjoyed by the federal government may afford a less effective defense. It is obviously a matter of serious import if tidelands owned by the United States as part of a military or other reservation are subject to pervasive control by the State invoking its "public trust" rights.

In all the circumstances, we believe the case justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DIRK D. SNEL
RICHARD J. LAZARUS
Attorneys

FEBRUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 398910 1283